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Subject: What procedures state licensing boards may use to establish state action antitrust immunity

Requested by: Preston P. Nunnelley, M.D.
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Syllabus: State licensing boards are advised to promulgate administrative regulations whenever they are taking actions that will significantly affect competition in markets. Individual licensing decisions should not be made in a concerted effort to impact competition. Provided they are not, they should not create a valid an antitrust claim.

Statutes construed: 15 U.S.C. § 1; KRS 311.550; KRS 311.602

Opinion of the Attorney General

Preston P. Nunnelley, M.D., President of the Kentucky Board of Medical Licensure ("KBML") has requested an opinion on how a state licensing board may regulate its profession while avoiding antitrust liability after the Supreme Court's decision in *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). We advise that state licensing boards should promulgate administrative regulations whenever they are taking actions that will significantly affect competition in markets. Individual licensing decisions likely will not qualify for state action antitrust immunity, although they should not state an antitrust claim.

I. Background

Dr. Nunnelley presents two situations currently before KBML. In the first situation, a board-licensed physician is planning to open a business to provide stress reduction through the use of biofeedback technologies. The licensee described the biofeedback technology by stating that "the equipment receives subtle energetic, or electromagnetic frequencies from the client that indicate personal stress. The equipment is then able to 'feedback' subtle frequencies, based upon information received, to the client that promote stress reduction, relaxation, and natural balancing."[1] The licensee believes that this service "is nothing remotely resembling a medical practice," but KBML members are concerned that the use of the licensee's medical credentials would create the impression that biofeedback technologies are a legitimate medical practice.

In the second situation, a non-physician wishes to open up a cash-only clinic to treat depression with ketamine, which is a Schedule III substance typically used as an anesthetic for animals and humans. There is some evidence of the benefits of ketamine for treating depression, but the treatment is still controversial. The KBML inquires as to whether it can regulate both of these activities as the "practice of medicine,"[2] but is concerned about potential antitrust liability for such actions in the wake of *N.C. Dental*. Specifically, KBML asks whether it is required to "opine that the . . . 'businesses' (both physician-owned or non-physician owned) constitute the 'practice of medicine or osteopathy.'" At issue is how professional licensing boards and agencies such as KBML may regulate activities which they believe to be within the scope of their authority, while avoiding antitrust liability for such actions.

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[1] *See generally Biofeedback*, MAYO CLINIC, http://www.mayoclinic.org/tests-procedures/biofeedback/home/ovc-20169724 (last visited Sept. 21, 2016).

[2] KRS 311.565(1)(a) provides that KBML may "exercise all the administrative functions of the state . . . in the regulation of the practice of medicine and osteopathy," and KRS 311.550(10) provides that the "'practice of medicine or osteopathy' means the diagnosis, treatment, or correction of any and all human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities." KRS 311.550(11) exempts other licensed professions from this definition.

II. State Action Immunity

It is important to first note that the controlling law as it relates to state action immunity is highly uncertain. The Sherman Act, codified at 15 U.S.C. §§ 1-7, provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The penalty for violations of the antitrust acts provides that the person injured "shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). In *Parker v. Brown*, 317 U.S. 341 (1943), the court established the doctrine of state action immunity for antitrust liability. The court held that "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." *Id.* at 351. Therefore, "when a state legislature adopts legislation, its actions constitute those of the State . . . and ipso facto are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984).

In *VIBO Corp., Inc. v. Conway*, 669 F.3d 675 (6th Cir. 2012), the court explained the operation of state-action immunity from antitrust laws:

> The Sherman Act does not apply to states or state officials when acting in their sovereign capacities. Even where the states act in conjunction with private parties, they remain entitled to immunity so long as they acted within their official capacity. However, if a state acts as a "commercial participant in a given market," action taken in a market capacity is not protected. Thus, "with the possible market participant exception, any action that qualifies as state action is 'ipso facto exempt from the operation of the antitrust laws.'"

Id. at 686-87 (citations omitted). States are entitled to immunity when acting in their sovereign capacities, even when they act in conjunction with private parties, as long as they act in their official capacity. However, if the state acts as a market participant, action taken in that capacity is not immune.

As with many state licensing boards, a state may delegate control over a market to a non-sovereign actor. "While the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not

always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor." *N.C. Dental,* 135 S. Ct. at 1110. If a state designates control over a market to a non-sovereign actor, the actions of the non-sovereign actor must meet a two-part test delineated *in Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Id.* at 105; *N.C. Dental,* 135 S. Ct. at 1110.[3] The clear articulation prong is met "'where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.'" *Id.* at 1112. The active supervision prong is met when "'state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *Id.*

III. *N.C. Dental*

In *N.C. Dental,* nondentists in North Carolina had started performing teeth whitening services. The North Carolina State Board of Dental Examiners ("Dental Board"), composed of six licensed dentists, a dental hygienist, and a consumer, issued cease-and-desist letters to the non-dentists performing teeth whitening services on the grounds that teeth whitening constituted the unauthorized practice of dentistry. As a result, the nondentists ceased offering teeth whitening services in the state of North Carolina. *Id.* at 1108. The Federal Trade Commission filed a complaint against the Dental Board alleging that "the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition." *Id.* at 1109. The Dental Board moved to dismiss on the grounds of state action immunity, but the Federal Trade Commission denied the motion, which was upheld by the Fourth Circuit. *Id.*

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[3] However, "active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party." *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 47 (1985). "Municipalities are subject exclusively to *Midcal* 's "clear articulation" requirement." *N.C. Dental,* 135 S. Ct. at 1112. *See also In re: Processed Egg Prod. Antitrust Litig.,* No. 08-MD-2002, 2016 WL 4771865, at *8 (E.D. Pa. Sept. 12, 2016) (state department of agriculture analogous to municipality and not subject to active supervision requirement).

Beginning its analysis, the *N.C. Dental* court noted that "while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor." *Id.* at 1110. The court then applied the *Midcal* test to the Board on the grounds that "state agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal* 's supervision requirement was created to address." *Id.* at 1114. The court adopted the assumption of the parties that the Dental Board met the clear articulation requirement. *Id.* at 1110. However, the court then applied the active supervision requirement to the Dental Board, finding that it did not meet the active supervision requirement, as it conceded a lack of supervision. "The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here." *Id.* at 1116. The court concluded that "if a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked." *Id.* at 1117.

N.C. Dental marked the first time that the *Midcal* two-prong test has been generally applied to all state licensing agencies. The *N.C. Dental* court did not specify what state licensing boards and agencies may do to preserve state-action immunity. State licensing boards and agencies presumably will meet the clear articulation requirement of the *Midcal* analysis through their enabling statutes. However, what constitutes active supervision of state licensing boards and agencies has not been previously addressed, and the legal environment following *N.C. Dental* is uncertain.

IV. Federal Trade Commission Guidance

Perhaps the most relevant guidance as to the interpretation of *N.C. Dental* has been provided by the Federal Trade Commission in its FTC STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS (Oct. 2015) ("FTC GUIDANCE"). The FTC cited to *N.C. Dental* to establish that active supervision applies to any "state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates." FTC GUIDANCE 7 (quoting *N.C. Dental,* 135 S.Ct. at 1114).

The FTC further stated that "active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision." FTC GUIDANCE 8. Generally, the FTC observed that "a state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision." *Id.* at 2-3.

The FTC clarified the scope of its guidance with several observations. First, "reasonable restraints on competition do not violate the antitrust laws," citing as an example that "a regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns." *Id.* at 6. Second, "the ministerial (non-discretionary) acts of a regulatory board . . . do not give rise to antitrust liability," citing as an example an applicant's failure to provide the required application fee. *Id.* Third, "the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the 'sham exception,'" citing as an example a board filing a lawsuit against a person for practicing without a license. *Id.* The FTC generally stated that prohibitions on fraudulent activity, ministerial acts, and the prosecution of lawsuits in themselves do not create antitrust liability.

Turning to what constitutes adequate active supervision, the FTC described a situation in which "the state legislature designated an executive agency to review regulations recommended by the state regulatory board," "the agency provided notice of (i) the recommended regulation and (ii) an opportunity to be heard . . . to other interested and affected persons," and "the agency took the steps necessary for a proper evaluation of the recommended regulation," such as accepting written submissions from outside sources, obtaining published studies, and holding public hearings. *Id.* at 11. The FTC appears to regard public notice-and-comment rulemaking as an example of adequate supervision.

Regarding discipline of licensees, the FTC noted that "a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition." *Id.* While the FTC provides commentary on how to secure

immunity in this area, such a practice may legitimize significantly impacting competition through individual licensing decisions, which is concerning.

The FTC generally advised that active supervision is required whenever a state licensing board has a controlling number of active market participants. A state licensing board may regulate fraudulent practices, perform ministerial acts, and institute lawsuits in good faith without subjecting itself to antitrust liability.[4] Active supervision is required for discipline of individual licensees in order to invoke state action immunity, but most individual licensing disciplinary actions will not affect competition. Notice-and-comment rulemaking procedures likely qualify for active state supervision.

V. Options for Active Supervision in Kentucky

Given the facts and holding of *N.C. Dental* and the FTC's subsequent guidance, we address the various options available to licensing boards in Kentucky and whether they are covered by state action immunity. We preface our analysis of these options with the caveat that this office has no authority to exempt anyone from antitrust liability, and that the advice rendered below represents this office's best guess in an extremely uncertain legal environment.

We begin with a general note that the implications of *N.C. Dental* extend only to the application of state antitrust immunity, and do not operate to create or remove any other immunities or defenses that are available. *Parker* state action immunity is only an immunity from antitrust liability, and the absence of state action immunity does not mean that any other applicable immunities from liability are waived. *See Rodgers v. La. Bd. of Nursing,* No. 16-30023, 2016 WL 6608960, at *3 (5th Cir. Nov. 8, 2016) ("Sovereign immunity and *Parker* immunity are separate and independent sources of immunity from private federal antitrust claims.").[5] The discussions below therefore only concern whether particular actions are covered by state action antitrust immunity, and do not address liability generally.

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[4] *See also* Idaho Att'y Gen. Op. 16-01 at 7-8 (Jan. 13, 2016) (discussing the FTC guidance).

[5] *See also N.C. Dental,* 135 S. Ct. at 1115 ("This case, which does not present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability.").

A. Promulgation of Administrative Regulations

KRS Chapter 13A provides procedures for promulgation of administrative regulations by agencies that have been given that authority. An agency proposing a regulation must file it with the regulations compiler, KRS 13A.220(1), and the proposed regulation is then published in the Administrative Register. KRS 13A.050. A public hearing and comment period is required, KRS 13A.270, and if the agency receives any comments, it must file a statement of consideration in response. KRS 13A.280. The regulation and comments are reviewed by the Administrative Regulations Review Subcommittee, KRS 13A.290, which is a standing joint subcommittee of the legislature. KRS 13A.020. The Regulations Review Subcommittee then forwards its findings, KRS 13A.290(5), which are assigned to an appropriate standing committee of the legislature for further review. KRS 13A.290(6). If neither subcommittee finds the regulation deficient, the regulation is promulgated. KRS 13A.330(1). If one of the subcommittees finds the regulation deficient, the Governor has the option to promulgate the regulation notwithstanding the deficiency, KRS 13A.330(5)(a)(2), or withdraw the regulation. KRS 13A.315(2)(a). Regulations promulgated under KRS Chapter 13A are thus subject to public notice, comment, and hearing, and are then reviewed by two subcommittees of the legislature and potentially the Governor.

Of the options presently available under Kentucky law, promulgation of regulations is the most likely to receive state action immunity. The FTC has indicated that public notice and comment rulemaking likely qualifies for active state supervision.[6] KRS Chapter 13A provides for review by two legislative subcommittees and potentially the Governor, ensuring that at least one and possibly two of the branches of state government review and approve the action. Further, the problems present in *N.C. Dental*, where a state licensing board eliminated a market on its own authority without any public review, are mitigated by giving the public an opportunity to comment and be heard on the proposed regulation.[7]

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[6] *See also* Cal. Op. Att'y Gen. 15-402 at 8 (Sept. 10, 2015) ("Promulgation of regulations is a fairly safe area for board members, because of the public notice, written justification, Director review, and review by the Office of Administrative Law as required by the Administrative Procedure Act.").

[7] *But see Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529 (W.D. Tex. 2015) (granting preliminary injunction against proposed rule requiring face-to-face examination by physicians).

B. Individual Licensing Decisions

Concerning what will probably be of the most importance to state licensing boards, individual licensing decisions probably do not qualify for state action antitrust immunity, but they also will generally not state a claim under the antitrust laws. "To establish an antitrust violation, a plaintiff must show a contract, combination, or conspiracy that affects interstate commerce and unreasonably restrains trade." *Lie v. St. Joseph Hosp. of Mount Clemens, Mich.*, 964 F.2d 567, 568 (6th Cir. 1992). "Isolated business torts . . . do not typically rise to the level of a . . . violation unless there is a harm to competition itself." *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 372 (6th Cir. 2003). In general, action against an individual does not affect competition enough to state an antitrust claim.[8] The FTC has generally concurred, stating that "a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition." FTC GUIDANCE 12. Thus, discipline of individual licensees, although not shielded by state action immunity, will nevertheless generally not constitute an antitrust violation.[9] However, the FTC did note that "a pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition." *Id.*

VI. KBML Issues

As applied to the issues raised by Dr. Nunnelley, KBML seeks advice regarding two specific situations. First, it seeks to prevent a licensee from using his credentials as a physician in his biofeedback business. Specifically, KBML is split in that some members do not consider biofeedback services to be a legitimate medical procedure, but if biofeedback practices do not constitute the practice of medicine, then KBML has no authority to regulate them. Second, it seeks

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[8] *See Petrie v. Va. Bd. of Med.*, 648 Fed. Appx. 352 (4th Cir. 2016); *Robb v. Conn. Bd. of Veterinary Med.*, 157 F.Supp.3d 130 (D. Conn. 2016) (individual disciplinary actions failed to state antitrust claims against state licensing boards under *N.C. Dental*); *see also* Cal. Op. Att'y Gen. 15-402 at 9 (Sept. 10, 2016) ("Suspending the license of an individual license-holder for violating the standards of the profession is a reasonable restraint and has virtually no effect on a large market, and therefore would not violate antitrust laws.").

[9] *But see Patrick v. Burget*, 486 U.S. 94 (1988) (anticompetitive activities of hospital group against individual doctor constituted an antitrust violation).

to regulate the provision of ketamine as a treatment for depression as the practice of medicine, and thereby prevent its practice without a license. Although both situations currently only involve individual licensees, in the wake of *N.C. Dental,* KBML is concerned about taking actions that could harm entire markets, such as the market for biofeedback services or ketamine treatments. The KBML does not indicate that it has considered any discipline in these situations, but asks only whether it is required to "opine that the . . . 'businesses' (both physician-owned or non-physician owned) constitute the 'practice of medicine or osteopathy.'"

Regarding the first situation, some members of KBML do not want to countenance biofeedback services as the practice of medicine. The board does not appear to be seeking to eliminate the practice of biofeedback services by non-physicians, but seems more concerned that the licensee's medical credentials will be used to legitimize or create additional professional responsibilities on bio-feedback providers. Given what appear to be the board's aims, the best solution seems to be that KBML should enact a regulation which specifies that its licen-sees may not use or represent the use of their medical credentials in the provision of biofeedback services, and any provision of biofeedback services must be performed at a separate facility from the location of the licensee's practice as a physician. Such a regulation would allow physicians to operate biofeedback facilities if they choose, provided that they do not represent that those services are the legitimate practice of medicine. Alternatively, KBML could attempt to promulgate a regulation which states that biofeedback services constitute the practice of medicine, and are therefore subject to the requirements and regula-tions of KBML.

Regarding the second situation, the establishment of clinics by non-physicians for the provision of ketamine for treatment of depression is a more direct test of state antitrust liability after *N.C. Dental,* as it would potentially affect an entire market for providing ketamine for depression. It is unclear from KBML's opinion request, but should KBML wish to regulate or prevent this treatment, its best option currently available is to promulgate a regulation stating that the provision of ketamine for the treatment of depression constitutes the practice of medicine.

More specifically, KBML also asks whether it is required to opine that such situations constitute the practice of medicine. The KBML is one of the state

licensing boards which has been granted the power to issue advisory opinions. KRS 311.602(1) provides that:

> In order to assist a licensee in determining what actions would constitute unacceptable conduct under the provisions of KRS 311.595, the licensee may request an opinion of the board by written request submitted to the secretary; the board may, in its discretion, cause a written response to be made to each requesting licensee if the request addresses an issue of such public or medical interest that the board's opinion on the subject is deemed desirable.

KRS 311.602(1) gives KBML the power to render advisory opinions upon request from a licensee and a determination by KBML that the issue is of public or medical interest. However, KRS 311.602(1) does not specify that the opinion has any binding effect on the licensee or KBML, or any review procedures for such opinions, so opinions under KRS 311.602(1) appear to be merely advisory.

KBML's advisory opinions under KRS 311.602 do not appear to be subject to any kind of review, and are therefore not subject to any kind of active supervision. KBML is therefore advised to be cautious and judicious in issuing such opinions. KRS 311.602(1) expressly provides that the issuance of such opinions is a matter of KBML's discretion, and KBML is not required by KRS 311.602(1) to opine on any particular subject. Should KBML decide, for example, that the provision of ketamine for treatment of depression constitutes the practice of medicine, it may do so in an advisory opinion. However, we would caution against reliance on such an opinion alone in enforcement actions against licensees or non-licensees, and would advise at a minimum that KBML should promulgate such determinations into administrative regulations before enforcement. Given that an opinion by KBML may have a chilling effect on particular practices even prior to enforcement, KBML may find it preferable to decline to issue an opinion in its discretion under KRS 311.602(1), in favor of more general notice-and-comment rulemaking procedures.

Conclusion

In summary, we advise that a state licensing board wishing to take action against a particular service or practice generally should promulgate authority to

take such action into regulations through notice-and-comment rulemaking, which is protected by state action antitrust immunity. Individual licensing decisions are probably not shielded by state action antitrust immunity without active supervision, although they also will not typically state an antitrust claim. In the wake of *N.C. Dental*, state licensing boards should go about their ordinary business as usual, but should exercise caution in taking actions that could affect or eliminate entire markets.

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